Supreme Court, U.S.
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No. (1) OFFICE OF THE CLERK

In the

# Supreme Court of the United States

LEE CRANMER,

*Petitioner,*

vs.

TUCSON POLICE DEPARTMENT, CITY OF TUCSON, TYCONIC, INC., CHIEF RICHARD MIRANDA, DET. M. LENARD and JOHN DOE LENARD, OFC. MARK SPELLMAN and JANE DOE SPELLMAN, KATHLEEN DAILY and JOHN DOE DAILY

*Respondents.*

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Should a civil litigant, innocent of wrongdoing or bad faith, have relief under Federal Rules of Civil Procedure, Rule 60 (b) (6), from the misconduct or neglect of his attorney when the attorney has, through gross negligence and disability, abandoned his representation of the client, failing to conduct discovery, meet deadlines, or respond to a motion for summary judgment, and that misconduct or neglect has resulted in an adverse ruling on a motion for summary judgment against the client?

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## PETITION FOR A WRIT OF CERTIORARI

Lee Cranmer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinions below are unreported. The orders of the courts below are included in Appendices A, B, C, and D.

## JURISDICTION

The Court of Appeals entered its judgment on May 14, 2008. See Appendix C.
A timely petition for rehearing and a suggestion for en banc review were filed on June 4, 2008. They were denied on July 2, 2008. See Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves no constitutional or statutory provisions. The text of Fed.R.Civ.P., Rule 60 (b) (6) is attached as Appendix E.

## I. STATEMENT OF THE CASE

Petitioner Lee Cranmer, represented by

attorney David Bjorgaard, filed two civil actions against Respondents in Arizona state court in 2003, one making claims under the Fourth Amendment to the U.S. Constitution and the other various state tort claims. Both actions alleged that on April 22, 2002, Petitioner had been wrongfully arrested by Tucson Police Department officer Sgt. Spellman in connection with the arrest and prosecution of his then-wife, Jeanie Herring.[1] Both actions were removed by Respondents to U. S. District Court for the District of Arizona and consolidated into the present case.

Discovery and disclosure were conducted and scheduling orders entered. On July 1, 2004, the District Court set a deadline for expert disclosure. Petitioner timely disclosed the name and address his expert on fraud investigation by law enforcement, and the standard of care for a fraud investigator, but did not disclose any opinions or qualifications as required by the rules. Petitioner's deposition was taken in December, 2004. Mr. Bjorgaard did not conduct any further discovery and did not comply with the requirements for disclosure of expert opinions or qualifications.

Respondents filed motions for summary judgment on December 14, 2004. On Petitioner's motion, the District Court extended the time for his

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[1]Tyconic, Inc., a private flight school, was named because Spellman had been acting as an employee of the school at the time he arrested Cranmer, and Spellman had held Cranmer on the school premises for several hours, with the approval or acquiescence of his employer.

response to February 11, 2005. The date came and went with no response. Respondents filed motions for summary disposition of the motions. Bjorgaard did not respond to these motions either.

For several months, nothing more happened in the case and the District Court took no action on the motions. It appears that Bjorgaard simply stopped working on the case during that time. In late May, 2005, Cranmer contacted his attorney and learned for the first time that a response had not been filed. Bjorgaard filed a response to one of the motions on June 2, 2005. The District Court, on its own motion, struck the response as untimely. A response to the other motion for summary judgment was filed thereafter. These responses argued the facts adduced by Respondents but did not set forth any additional facts or present any additional evidence.

Petitioner, still represented by Bjorgaard, filed a motion to reconsider the order to strike, and on June 18, 2005, the District Court granted the motion, vacated its order, and directed Bjorgaard to file a memorandum showing cause why the responses should not be stricken.[2]

Bjorgaard filed his memorandum on July 1, 2005, explaining that the failure to file a timely response was entirely due to personal problems in his

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[2]Present counsel associated with Mr. Bjorgaard on June 22, 2005, and later substituted for him.

life and was not in any way the fault of his client. Bjorgaard cited the fact that he had twice been the victim of crime, that his ten-year old son had been ill, that he had lost money in a financial transaction and was having financial difficulties, and that he had been having emotional problems and had sought help through the Member Assistance Program of the Arizona State Bar. He pointed out that he was attempting to correct the situation by associating with new counsel. He also requested, as an alternative to striking the responses, that the court consider imposing a sanction on him personally that would not harm his client.

On September 27, 2005, the District Court entered an order striking Petitioner's responses to the motion for summary judgment and granting the motions. See Appendix A[3] The court indicated it would have granted the motions even if it had considered the responses, because Appellant did not offer any facts or evidence beyond those set forth in Appellees' motions. Final judgment was subsequently entered in favor of Respondents as to all issues.

On October 7, 2005, Petitioner, through present counsel, filed his Motion for New Trial, Motion to Correct or Amend Judgment, Motion for Relief from Judgment Under Rule 60 (b), and Alternative Motion to Reconsider. The motion was accompanied by exhibits, including the affidavit, report, and CV of the

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[3]The order is dated September 12, 2005, but was not filed until September 27, 2005.

expert whose identity had previously been disclosed, excerpts of Petitioner's deposition, and a grand jury transcript. The motions sought relief on several grounds, including excusable neglect under Fed.R.Civ.P., Rule 60 (b) (1) and "extraordinary circumstances" (attorney abandonment) under Rule 60 (b) (6).

On May 9, 2006, Petitioner filed a motion for leave to amend or supplement the motion for new trial, attaching orders and dockets from the District Court and from Arizona state courts involving Bjorgaard's actions in other cases during the relevant time period. Petitioner argued that Bjorgaard's failure to file timely or complete oppositions to the motions for summary judgment constituted "gross negligence" and "attorney abandonment," and established grounds for relief under Rule 60 (b) (6). Attached to this motion was the affidavit of one of Petitioner's present attorneys, detailing his conversation with Bjorgaard regarding Bjorgaard's disabilities, including depression and anxiety, for which he was under treatment. The materials included records from other cases being handled at about the same time by Bjorgaard, in which Bjorgaard had been sanctioned for failure to file responses, appear for hearing, or meet deadlines. The motion to supplement requested that the court consider these materials, grant time for additional investigation, and set a hearing so that this evidence of abandonment could be developed further. Additional such materials were submitted on May 26, 2006. These materials showed that Bjorgaard had virtually abandoned his practice during in late 2004, early 2005.

On July 7, 2006, without hearing or oral argument, the District Court entered its order denying the motion for new trial, denying relief on all grounds, including attorney abandonment and manifest injustice under Rule 60 (b), and denying Petitioner's motions for leave to amend or supplement. See Appendix B.

On July 27, 2006, Petitioner filed a timely appeal to the U.S. Court of Appeals for the Ninth Circuit. In the course of the appeal, the Court of Appeals took judicial notice of the fact that, in 2007, removal proceedings had been initiated by the Court following Bjorgaard's suspension from the practice of law in Arizona, that Bjorgaard had failed to respond to those proceedings, and that he had been disbarred from practice before the Ninth Circuit.

On May 14, 2008, following oral argument, the Court of Appeals issued an unpublished Memorandum disposition, ruling that the District Court had not abused its discretion by denying Petitioner's Rule 60 (b) motion. See Appendix C, p. 3. On the attorney abandonment issue, the Court of Appeals stated that because the District Court had "entered judgment on the merits of the case," Petitioner was not entitled to relief. The Court of Appeals distinguished on this basis its own decision in Community Dental Services v. Tani, 282 F.3f 1164, 1169 (9th Cir. 2002). See Appendix C, pp. 5, 6.

On June 4, 2008, Petitioner filed a timely

petition for panel rehearing and a suggestion for for en banc rehearing. The petition was denied and the suggestion rejected on July 2, 2008. See Appendix D. This Petition for Certiorari followed.

## II. STATEMENT OF FACTS

In early 2002, Petitioner Lee Cranmer entered into what he believed was a valid marriage with Jeanie Hering. Petitioner was beginning a promising career in medicine in Arizona. He held an undergraduate degree from Harvard and a medical degree from the University of San Diego, and had served a residency at the Mayo Clinic in Rochester, Minnesota. He was licensed to practice medicine in Arizona and was employed as a Fellow at the Arizona Cancer Center at the University of Arizona. He also worked at the VA Hospital in Tucson. Dr. Cranmer's personal life was above reproach. He had excellent credit, no criminal history, and had never been in trouble with the law.

Hering seemed to be a suitable match, a stable, well respected, well dressed person with a good job. As it later developed, she was in fact a relentless con artist, a convicted felon who had served federal prison time, a "deadbeat" who had numerous civil judgments against her for unpaid debts, and a bigamist who had "married" Cranmer without bothering to divorce her previous husband.

In late 2001, Dr. Cranmer had begun to suspect that he might be the victim of fraud. Problems began to develop with several of his bank accounts and a

bank account of his mother's for which he served as trustee. He stopped receiving statements and his account was overdrawn. Charges began to appear on an inactive credit account. He contacted the bank and learned that bad checks were being deposited into his account. He requested a fraud packet so he could make a formal report. Over the next several months, he made repeated efforts to get to the bottom of the apparent fraud. He made trips to the bank and eventually obtained materials indicating someone was defrauding him. He made fraud reports to the bank and reports to the police. He contacted the broker for his mother's trust account to alert him to possible fraud.

In March, 2002, Cranmer began taking flight lessons from Tyconic, Inc. His flight instructor was Mark Spellman, who was also a police officer with the City of Tucson Police Department. The lessons were arranged by Hering as a gift.

Cranmer did not suspect Hering of wrongdoing. She claimed to be a victim, too, and he had no reason to doubt her. She made extraordinary efforts to throw him off her trail, giving him false information about Secret Service and FBI investigations of the fraud and taking him to see a lawyer. At one point, she even claimed that the people who had been defrauding them had been caught in Nevada.

It was not until April 18, 2002, that Hering's facade of innocence began to crumble. Cranmer discovered that a check from the back of his check book on a credit union account had been used over his

forged signature. He reported the incident to the police and closed the account. This made him suspect Hering because no on else had access to these checks. He contacted the cruise line he and Hering had used for their honeymoon and learned there was fraudulent activity on the credit card account Hering had used to book the cruise. On April 21, he discovered that Hering had had calls to his cell phone forwarded without his knowledge.

On April 22, after working all night at the VA Hospital, Cranmer realized that if all of the transactions entered into by Hering were fraudulent, her "gift" of flight lessons might be as well. He called Tyconic and spoke to Spellman. Spellman told him the Tyconic bill had not been paid. Cramer told Spellman he would be down to pay it that morning. He obtained a cashier's check and met Spellman at Tyconic to pay the bill in full.

Spellman accepted Cranmer's payment and then told Cranmer he was now acting as a sergeant of the Tucson Police Department. He directed Cranmer to step into a room at the school and to sit in a chair. He asked him if he had any dangerous items in his pockets. In answer to Cranmer's question whether he was under arrest, Spellman told Cranmer he was being "legally detained." He told Cranmer he was going to call a detective. He then tried to take Cranmer's statement. He held Cranmer in the room for three hours, coming in and out, asking questions, and making accusations. Spellman accused Cranmer of committing crimes, questioned whether Cranmer was a "real doctor," and did everything he could to

humiliate, frighten, and induce him to confess to a crime. Eventually, Spellman arranged for Cranmer to be taken into custody by the Tucson Airport Authority Police, who transported him to jail and the courthouse, where he was released.

A preliminary complaint for fraudulent schemes and artifices and other serious crimes was filed against Dr. Cranmer in state court, but he was never formally charged. At the grand jury proceedings in Hering's case, conducted eleven days after Cranmer's arrest, Tucson Police Department Detective Lenard testified that the most she could say was that Dr. Cranmer "might or might not" be aware of the fraudulent nature of the payments to Tyconic. She was unable to point to any specific information concerning his possible knowledge of (much less involvement in) this transaction. Hering was arrested, charged, convicted, and eventually sentenced to state prison. Cranmer was recognized as a victim of Hering and was eventually able to seal but not expunge his arrest record and record of the preliminary charges. In these proceedings, state court judges found that, pursuant to A.R.S. §13-4051, Petitioner had been wrongfully arrested and charged. Eventually, after Cranmer's investigator discovered Hering was also a bigamist, Petitioner was able to have his "marriage" annulled and declared void.

As noted, Petitioner's attorney did not take any depositions or obtain a report from an expert. Present counsel did obtain a report from an expert, after the motions for summary judgment had been granted, and provided the expert's report to the District Court in

support of the motion for new trial, etc. That expert, a fraud examiner with 30 years experience, was prepared to testify that Spellman lacked probable cause to arrest Plaintiff on April 22, 2002, and that the police investigation was improperly conducted, insufficient, and biased.

## III. REASONS FOR GRANTING THE PETITION

### A. The Ninth Circuit's Memorandum Decision is in Conflict with its Own Published Opinion in Community Dental Service, Inc. v. Tani, and with More Recent Orders and Decisions in the Ninth Circuit and Decisions in Other Circuits. The Ninth Circuit Should Have Stated a Rule Allowing a Litigant to have Relief from the Grossly Negligent Actions of his Attorney, Especially Where the Attorney is Disabled and has Abandoned Not Only the Litigant's Case but Virtually his Entire Practice, Regardless of Whether the Adverse Result Takes the Form of a Default or a Summary Judgment, When as a Result of the Attorney's Misconduct, the Client's Case is Not Presented to the Court in a Meaningful Way.

Fed.R.Civ.P., Rule 60 (b) (6) allows the District Court to grant relief for any reason justifying relief from the judgment. This provision includes situations in which "extraordinary circumstances" beyond a party's control have prevented the party from protecting his interests. Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir. 1998). In the Ninth Circuit and others, this broad standard has been held to

include relief from a party's attorney's misconduct when that misconduct rises to the level of gross negligence. Community Dental Services v. Tani, supra. See also Boughner v. Sec'y of Health, Educ. & Welfare, 572 F.2d 976, 978 (3d Cir. 1978), Carter v. Albert Einstein Med. Ctr., 804 F.2d 805, 806 (3d Cir. 1986), Shepard Claims Serv. v. William Darrah & Assocs, 796 F.2d 190, 195 (6th Cir. 1986), L.P. Steuart, Inc. v. Matthews, 329 F.2d 234, 235 (D.C. Cir. 1964), and Pimbs v. United States, 4 Cl. Ct. 366, 370 (1984).

The general rule is that clients are charged with their attorney's negligent acts and are considered to have notice of all facts known by their lawyer. Link v. Wabash RR Co., 370 U.S. 626, 633-34 (1962); Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141-42 (9th Cir. 1989). The Ninth Circuit has held, however, that where the attorney's actions go beyond mere negligence and constitute "gross negligence," a client should be relieved of the effects of his attorney's misconduct. This principle, which has been adopted by several circuits, was initially recognized in American Financial Life Ins. v. Llewellyn, 139 F.3d 664, 666 (9th Cir. 1997). In Community Dental v. Tani, supra, the Ninth Circuit explicitly held that "when a client has demonstrated gross negligence on the part of his counsel, a default judgment against the client may be set aside pursuant to Rule 60(b)(6)," reversing the District Court for abuse of discretion. In that case, Tani's attorney had "virtually abandoned" his client, filing an answer two weeks late, failing to serve it, and failing to file an opposition to the other side's motion to strike the answer, all while assuring his client that the case was proceeding normally.

By focusing on the method by which the harm was accomplished rather than the conduct of the attorney and the innocence of the client, the Ninth Circuit's Memorandum disposition illogically and unduly limited the scope of this remedial rule. The rationale in Tani and other cases was that: (1) the rule was remedial and must be liberally applied; (2) cases should be decided on the merits whenever possible; and (3) when an attorney is grossly negligent, the legal system loses credibility if "an innocent party is forced to suffer drastic consequences." The Ninth Circuit also reasoned in Tani that if the gross negligence "results in the client receiving practically no representation at all" the agency relationship is vitiated. None of these reasons has anything to do with whether the harm takes the form of default judgment or a summary judgment. Obviously, from the client's perspective, the difference is meaningless.

Three of these considerations clearly apply with equal or greater force in Petitioner's case. Indeed, Bjorgaard's conduct went beyond merely missing a deadline by a few weeks and failing to serve an answer. Bjorgaard conducted no discovery over a period of many months, did not obtain or disclose the opinions of an expert, and then waited over three months to file his response to the motions for summary judgment, even though Respondents had filed motions for summary disposition. He filed something only because his client learned of the failure and prompted him to do so. What Bjorgaard filed was a "bare bones" response that added no new facts or evidence, not even

evidence like the grand jury transcript or his client's deposition that were in his possession.

Further, as applied to the facts of the present case, the distinction between a default and summary judgment, on ground that the latter is really a "decision on the merits," is false. Therefore, the fourth consideration, the preference for a judgment on the merits, also applies. The District Court had before it so little from Petitioner that the adverse result was all but preordained. Although the District Court stated that it was following the requirements of Fed.R.Civ.P., Rule 56 (c), it did so on a record devoid of any of the information and evidence Petitioner could have presented if his attorney had not abandoned him. See Exhibit A.

The Memorandum decision in this case unduly limits a remedial rule adopted by the Ninth Circuit, as well as the Second, Third, Sixth, and Federal Circuits (see below). It is in conflict not only with Tani, but with the way that decision is interpreted in the Ninth Circuit. See Suntharalinkam v. Attorney General, 458 F.3d 1034, reh. en banc granted, 479 F.3d 1018 (9th Cir. 2007) (dissent). This Petition affords the Supreme Court an opportunity to adopt a broadly remedial reading of Rule 60 (b) (6) that will increase respect for the judicial system and recognize that it is the interests of litigants in a decision on the merits that should take precedence.

Other Circuits have granted relief from summary judgment for an attorney's gross negligence or abandonment of clients. In Boughner, supra, the

Third Circuit held that where an attorney, who also committed misconduct in other cases, engaged in "neglect so gross it is inexcusable" including failing to respond to a motion for summary judgment, "entry of summary judgment precluded an adjudication on the merits of appellant's case" and relief was warranted. In U.S. v. Cirami, 563 F.2d 26, 34 (2nd Cir. 1977), a showing by the appellants that their attorney had abandoned them and other clients due to mental illness justified relief from summary judgment.

### B. This Petition Affords the Supreme Court an Opportunity to Address a Question that has Remained Open and Unresolved Since this Court's Opinion in Link v. Wabash Railroad, Which Stated the General Rule that a Client is Accountable for the Negligent Acts or Omissions of his Attorney, but Reserved the Question of Whether Relief Might be Available under Rule 60 (b) (6) and Did Not Address a Situation in Which the Attorney was Grossly Negligent and had Abandoned the Client or his Practice.

In Link v. Wabash RR Co., 370 U.S. at 633-34 (1962), this Court considered whether a client should have relief from the actions or omissions of his attorney. Although the Court stated the general rule that litigants are generally chargeable with their attorney's conduct, having chosen them as agents, that opinion was limited in two ways.

First, the conduct of the attorney Link did not rise above the level of negligence. He missed a single pre-trial conference, after which the petitioner's case was dismissed. There was no evidence that he had abandoned the case entirely, become disabled, or abandoned his practice. This is a significant difference. The lower court cases which have crafted exceptions to the general rule have done so in part because the conduct of the attorneys was so egregious as to negate the agency principles on which the rule is based. Petitioner's case presents an excellent opportunity to consider the limits of Link on a record in which the egregiousness of the attorney conduct is manifest: The record in this case demonstrates that Bjorgaard took no action for several months, took no action until he was prompted by his client, failed to respond to a dispositive motion, filed an inadequate response, and conducted no discovery, thereby predetermining an adverse result for Petitioner. Moreover, the record is also replete with information concerning Bjorgaard's abandonment of other clients in similar circumstances.

Second, the petitioner in Link argued only that the District Court had abused its discretion by dismissing for failure to prosecute under Rule 42. He did not raise Rule 60 (b). This Court found no abuse of discretion, but expressly declined to state whether it would have reached a different result if the petitioner in that case had "sought to avail himself of the escape hatch provided by Rule 60 (b). " Link, 370 U.S. at 635-36.

This Court considered a related issue under

Rule 60 (b) (1) in Pioneer Invest. Srvs. Co., v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 393 (1993). In that case, the Court upheld relief for a bankruptcy claimant whose attorney had missed filing a claim by a bar date. This Court held that "excusable neglect" under Rule 60 (b) (1) encompassed situations in which a party's attorney was negligent or otherwise at fault. See also Stutson v. United States, 516 U.S. 193 (1996) (applying rule of Pioneer Investment to Fed.R.Crim.P., Rule 4, to uphold relief for criminal defendant whose attorney filed his notice of appeal one day late). However, in reaching this conclusion, this Court took exception to the suggestion by the Eleventh Circuit that it would be inappropriate to penalize litigants for the omissions of their attorney. This Court restated the rule of Link and emphasized that the proper focus was whether the conduct was excusable. See also United States v. Boyle, 469 U.S. 241 (1985) (client could be penalized for attorney's late filing of tax return).

In none of these cases, however, has this Court been confronted with the issue of whether in a civil case, when an attorney's misconduct rises far above the level of negligence, and the attorney-client relationship is for all practical purposes negated by the attorney's neglect or disability, the client should have relief. This is a question of growing importance as litigation becomes more complex and clients become more reliant on their attorneys. It is an issue with direct ramifications for the esteem and trust the public can be expected to place in the legal system during a time when the reputation of that system is increasingly under assault.

The Supreme Court now has an opportunity to declare a general rule in a matter of first impression before this Court. By fashioning a rule that will allow deserving litigants to avoid the harsh results that occur when they are virtually abandoned by their attorneys, this Court can foster greater fairness in litigation and greater respect for the legal system. Such a rule will also recognize the realities of modern litigation in which all but a few civil litigants in the federal courts are represented by attorneys and depend on the honesty, competence, and diligence of their attorneys to navigate an increasingly complex legal system. This rule would be consistent with the underlying principles in Pioneer Investments Services and Stutson and would allow this Court to harmonize those decisions with the holdings in Link and Boyle.

### C. The Petition Should be Granted to Maintain Uniformity Among the Circuits and Resolve Conflicts Between the Result in this Case and the Rule in Other Circuits Over Whether a Client who Suffers Harm to His Case from Attorney Abandonment May Have Relief when that Harm Comes in the Form of a Summary Judgment as Opposed to a Default.

Despite a trend in favor of more liberal interpretation of Rule 60 (b) (6) and in favor of relieving clients from the misconduct of their attorneys, see Pioneer Investment Services, supra, and Stutson, supra, there remains a serious split between the circuits on the issue whether and under what circumstances a client may have such relief. Whereas the Second, Third, Sixth, and Federal Circuits, and the

Court of Claims appear to have adopted a rule allowing such relief under some circumstances (see above), and the Fourth Circuit allows relief where the attorney's misconduct amounts to disloyalty or seriously misleading the client, see In re Virginia Information Systems Corp., 932 F.2d 338 (4th Cir. 1991), the First, Seventh and Eighth Circuits appear to reject the possibility of such relief. See KPS & Associates v. Designs by FMC, Inc., 318 F.3d 1 (1st Cir. 2003) (rejecting Tani), citing Farm Constr. Services, Inc. v. Fudge, 831 F.2d 18, 21 (1st Cir. 1987); Reinsurance Company of America v. Administrator, 902 F.2d 1275 (7th Cir. 1990). See also Jacobs v. Electric Data Sys. Corp., 240 FRD 595 (M.D. Ala. 2007) (complete failure of attorney to provide representation amounting to collapse of attorney-client relationship may form basis for relief under Rule 60 (b).

Such an important aspect of the relationship between an attorney and client should not depend on a geographical accident. This Court should declare a single rule to govern this aspect of civil litigation in the federal courts. That rule should permit a client, such as Dr. Cranmer, who is the blameless victim of serious attorney misconduct to have his day in court.

## IV. CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | | |
|---|---|---|
| Lee Cranmer, a single person,<br><br>Plaintiff,<br><br>vs.<br><br>Tucson Police Department; City of Tucson; Chief Richard Miranda; Detective M. Lenard and John Doe Lenard, wife and husband; Officer Mark Spellman and Jane Doe Spellman, husband and wife,<br><br>Defendants. | ) | No. 03-CV-282 TUC JMR.<br><br>ORDER |

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| Lee Cranmer, a single person,<br><br>Plaintiff,<br><br>vs.<br><br>Tyconic, Inc.; Mark Spellman and Jane Doe Spellman, husband and wife; Kathleen Dailey and John Doe Dailey, wife and husband,<br><br>Defendants. | ) | Consolidated No. 04-CV-150 TUC JMR |

These cases involve the rampant fraudulent activities of Jeanie Hering, the apparent-wife of Plaintiff Lee Cranmer, M.D. Hering not only perpetrated check and credit card fraud, but she also committed bigamy in purporting to marry Cranmer, which Cranmer did not discover until many months later. Tucson Police investigators believed that Cranmer was Hering's accomplice in the ongoing fraud, and they eventually arrested both on the same day.

Hering was convicted, but Cranmer was never formally charged, and he brings these consolidated lawsuits against the police and Tyconic, the business that assisted the police in Cranmer' s apprehension. Both sets of Defendants, the City and Tyconic, have filed a motion for summary judgment.

Although Cranmer was never formally charged after his arrest, ample grounds existed for Cranmer's arrest. A non-exhaustive list of grounds include (1) Hering deposited $43,356 in Cranmer's bank accounts, the total sum of which was derived from five checks drawn on a closed account; (2) Cranmer did not return the calls of bank investigators; (3) Cranmer falsely told investigators that the FBI and Secret Service were working on his behalf when neither were; (4) Cranmer falsely told investigators that his attorney in South Dakota was working on his case (the attorney did not know Cranmer and was a prosecutor) and (5) Hering made payments for flying lessons for Cranmer, using stolen credit cards or stolen credit card numbers. For the reasons stated below, both motions are granted.

Background

The following facts are based on the evidence filed by Defendants in support of their motions for summary judgment. Plaintiff did not offer alternative evidence. Cranmer and Hering started living together in Cranmer's home at the end of June 2001, and they married in 2002. In July 2001, Hering obtained employment at Goodman's Office Furniture. Between September and December 2001, Hering purchased $12,860.00 worth of furniture from American

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1/ The Court granted Plaintiff an extension of time to February 11,2005 for filing responses to the motions for summary judgment. However, Plaintiff did not respond to the motions until June 2, 2005. Defendant's motion to strike is granted, although even perusal of Plaintiffs response indicates that no genuine issue of material fact exists.

Home Furnishings, using her own closed bank account from South Dakota and a credit card number she stole from Goodman's. Hering had the furniture delivered to the home she shared with Cranmer,

Cranmer started taking flying lessons from Tucson Aero Service Center in July 2001. On October 8,2001, Hering called in a payment of $600 for the lessons, using Cranmer's American Express card number. The $600 covered the outstanding invoices on Cranmer's account with Tucson Aero and left a credit, which Cranmer later used. On January

12, 2002, however, Cranmer notified American Express that the $600 payment had been unauthorized, and he was reimbursed by American Express. Cranmer did not contact Tucson Aero to dispute the payment.

On November 21, 2001, Hering called Tucson Aero to make a payment as a "Christmas gift" to Cranmer, charging $1000 to a stolen credit card belonging to James McDonald. Cranmer used this payment for flight lessons. When Cranmer quit taking lessons at Tucson Aero on December 16, 2001, he received a file that included the receipts, payment invoices, and corresponding credit card receipts for each credit card payment that Hering had made. McDonald called Tucson Aero on January 15, 2002 to inform them of the fraudulent charge. Tucson Aero subtracted the $1000 from Cranmer' s account and left a cell phone voice message with Cranmer. Hering called Tucson Aero the next day to charge the $1000 to another credit card, Cranmer's father's American Express card.

In November 2001, Crammer reported fraud to his bank, and asked that a fraud packet be mailed to him. At the end of December 2001, Cranmer called Wells Fargo again because he had never received the packet. He then attempted to obtain the packet from a bank branch, but when he anived the bank told him that a woman had called and had requested that the packet be delivered to Cranmer's home, located in a gated community. The woman had left a call-back number, which Cranmer recognized as Hering's old cell phone number. The

courier service told Cranmer that a woman at his house had accepted the fraud packet and had paid in cash for the delivery.

On March 12, 2002, Cranmer started his flying lessons again, this time with Defendant Tyconic, Inc. Cramner's flight instructor, Defendant Mark Spellman, was also a sergeant of the Tucson Police Department. Cranmer told Tyconic that Hering would call in a credit card number for his new account. Hering called Tyconic that day, saying that she wished to buy "block time" for Cranmer as a secret gift to him. She charged $882 to a credit card number stolen from Susan Gamble. On March 15, Gamble reported to the Tucson Police Department that $3,837 in clothing, flight services, and mail order purchases had been charged to her credit card between March 6 and 13, 2002. Gamble's actual card was still in her office drawer, which was located across the street from Hering's workplace. Hering would occasionally visit Gamble as a client. Cranmer and Hering called Tyconic several times to see if the discrepancies in the account had been resolved. When they were told that the problems remained, they indicated that Hering would come to pay in person. Cranmer's last lesson with Tyconic was on March 28; he had an appointment scheduled for April 1, but he called in sick and never returned.

Steve Weaver of Chase Manhattan Bank called Hering on March 30 regardingGamble's credit card. Hering said that she had purchased the flying lessons for Cranmer with her own Citibank card, whose number she claimed was two digits off

Gamble's card number. Weaver discovered, however, that no such Citibank card existed. Weaver left two messages on Cranmer's office phone on April 1, after being told by Hering that Cranmer was at work. Weaver also investigated an account that Cranmer held with Prudential Financial. On April 1, Prudential told Weaver that Cranmer had told Prudential that the Secret Service had been investigating fraud committed against Cranmer. Prudential gave Weaver the Secret Service report number given to Prudential by Cranmer. Weaver contacted the Secret Service,
and discovered that no such report number existed, nor was there any investigation under the last name of Cranmer. Weaver left more messages with Cranmer, including at a cell phone number provided by Cranmer to Prudential Bank. The phone had a female voice on the answering message, and when Weaver called it again on April 3, a woman calling herself Carla said that she had no idea who Cranmer was.

On April 3, Weaver finally contacted Cranmer through his pager. Crarimer confirmed that he was married to Hering, but he refused to talk to Weaver, referring him instead to Cranmer' s attorney in South Dakota, Gary Colwill, and to the Secret Service. Weaver called the number Cranmer gave as Colwill's, but the person answering said that the number was for a day care center. Weaver then called the South Dakota State Bar and was given a number for a Gary Colwill. Colwill answered and said that he has not been in private practice for years, that he is a prosecutor, and he did not know

the Cranmers.

On April 8, 2002, Cranmer stated in a declaration to Wells Fargo that movers had stolen his checkbook in September 2001, and that his bank information had apparently been passed to a criminal gang. He also reported that he had filed a police report on December 26, 2001, with the Pima County Sheriff, the Secret Service, and the FBI. He listed the FBI agent's name, phone number and case numbers, and he claimed that the suspects had been arrested. Cranmer listed an incorrect payment for one of the checks. Wells Fargo reimbursed Cranmer $1300.

On April 15, 2002, Cranmer contacted FBI Agent James Scharman by phone. Cranmer indicated that Hering had said that she had met with Scharman several times in connection with the investigation of fraud being perpetrated against Cranmer and Hering. Scharman responded that he had never met with Hering, knew nothing about such incidents, and did not work on fraud cases. Yet on April 18, Crarimer reported a forged check to the Tucson Police Department and said that Scharman was working on his fraud case.

Detective Margaret Lenard of the Tucson Police Department was assigned to the investigation of Hering in February 2002. She discovered that Hering was a multi-state offender with six social security numbers, and that Hering had written numerous checks on closed accounts and made charges on stolen and fraudulent credit accounts.

Five of those checks, written for $43,356.00, had been written to Cranmer and deposited into his bank account. Det. Lenard also learned about all of the incidents described above.

Det. Lenard discussed the grounds for Cranmer's arrest with Sgt. Spellman, Cranmer's flight instructor at Tyconic. On April 22, 2002, Cranmer called Tyconic, and Spellman answered the phone. Cranmer asked if Hering had paid the latest bill, and Spellman said no. Cranmer insisted that Spellman verify that Hering had not come in during the previous week to the pay the bill, and Spellman did so. Spellman told Cranmer the amount owed, and Cranmer said he would come in right away to pay it. When Cranmer arrived, Spellman told him, "You and your wife have some real problems. . . ." (Cranmer Dep. at 136:20—21, Exh. A, Tyconic Defs.' Stmnt. Facts (Dec. 14, 2004).) Cranmer responded, "I recognize that." (Id.)

Speliman said that he was acting as a police officer and not for Tyconic, and without using force he detained Cranmer in a side room. Speilman left to call Det. Lenard, and returned to ask Cranmer questions, but Cranmer responded, "Mark, you know very well that, under these circumstances, I can't talk to you." (Id. at 138:7—8.) Spellman continued questioning Cranmer intennittently for the next three hours, leaving frequently to use the telephone. Cranmer was permitted to use the restroom, and at that point he had a brief interaction with two Tyconic employees, including Defendant Dailey.

During questioning, Speliman accused Cranmer of fraud and of not being a real doctor. Spellman tried to get Cranmer to make a confession by telling him, "It's going to be easier for everyone involved. When we get one of you, we get the other, so you might as well start telling the story." (Id. at 139:9—11.) Speilman explained that they were waiting for Det. Lenard to arrive, but at some point he indicated that she had become occupied with other matters. Cranmer eventually asked to speak with his lawyer. Speilman arrested Cranmer at 12:45 p.m., and Hering was arrested later that day. Cranmer was booked and arraigned on the same day, but the Pima County Attorney's Office never filed formal charges against him.

The City Defendant's accounting and fraud expert, Chris Linscott, concluded that any reasonable fraud investigator, knowing what Det. Lenard knew, would have concluded that a significant amount of evidence existed that Cranmer was involved in fraud. Plaintiff has not provided expert testimony.
Complaint

Cranmer filed his complaints against both sets of Defendants in state court on April 18, 2003, Defendants removed the cases to this Court, and the Court consolidated the cases on May 26, 2004. Cranmer alleges that his warrantless arrest by the City Defendants violated the Fourth Amendment of the U.S. Constitution, Article 2.1(A)(1) of the Arizona Constitution, and "laws of the State of Arizona." Cranmer also alleges that in arresting him, the City committed false imprisonment, malicious

prosecution, defamation of character, gross negligence, and negligence, and that Speilman's interrogation constituted intentional infliction of emotional distress. Cranmer alleges that the Tyconic Defendants, in participating in Speliman's activities, committed false imprisonment, defamation of character, and intentional infliction of emotional distress.

Summary Judgment Standard

Summary judgment is appropriate under Fed. R. Civ. P.56(c) where the moving party carries its initial responsibility of"demonstrat[ing] the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Thereafter, the opposing party "may not rest upon the mere allegations or denials of his pleadings, but. . . must set forth specific facts showing that there is a genuine issue for trial."Anderson v. Liberty Lobby, Inc., 477 U.S. 242,248(1986) (quoting Rule 56(e)). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." Id. The Court must "view the evidence in the light most favorable to the nonmoving party." Suzuki Motor Corp. v. Consumers Union of US., Inc., 330 F.3d 1110, 1140 (9th Cit 2003).

"[I]f the opposing party does not serve and file the required answering memoranda, . . such non-compliance may be deemed a consent to the denial or granting of the motion and the Court may

dispose of the motion summarily." LRCiv 7.2(i), Local Rules. Yet a motion for summary judgment may be granted only if the moving party meets its initial burden under Rule 56(c). See Martinez v. Stanford, 323 F.3d 1178, 1182—83 (9th Cir. 2003).

Motions for Summary Judgment

City of Tucson

Most of the claims hinge on whether Cramner's arrest was wrongful.2

(1) Warrantless Arrest

a. Legal Standard

A warrantless felony arrest may be made based upon probable cause. Tennessee v. Garner, 471 U.S. 1, 7 (1985). "Probable cause [to arrest] is established if, at the time the arrest is made, 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." Bailey v. Newland, 263 F.3d 1022, 1031 (9th Cir. 2001) (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)), cert. denied, 535 U.S. 995 (2002). When there has been communication among agents, probable cause can be based upon the investigating agents' collective knowledge. United States v. Butler, 74 F.3d 916, 920—21 (9th Cir.), cert. denied, 519 U.S. 967 (1996). The individual City Defendants are entitled to

qualified immunity if their actions were

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2 Because summary judgment for the City Defendants is justified on the merits, the Court does not address the City's arguments regarding the improper naming of parties.

constitutional. Prison Legal News v. Lehman, 397 F.3d 692, 701(9th Cir. 2005).

Cranmer was arrested for fraudulent schemes and artifices, and for theft, both felonies. The former is committed by anyone who, "pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions." A.R.S. § 13-2310(A). Theft is committed by anyone who "[o]btains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services; or.. . [c]ontrols property of another knowing or having reason to know that the property was stolen A.R.S. § 13- 1802(A)(3) and (5).

b. Discussion

Det. Lenard and Sgt. Speilman had probable cause to arrest Cranmer. Although the investigation pointed to Hering as the primary suspect, several facts implicated Cranmer as well. Cranmer was living with and apparently married to Hering, and he had received benefits such as furniture, flight lessons, and large bank deposits from the fraudulent credit

charges. Cranmer learned from Wells Fargo in December 2001 that Hering had made elaborate attempts to prevent him from reporting fraud to Wells Fargo. In January, 2002, Cranmer reported that Hering's American Express payment to Tucson Aero was fraudulent, and he received reimbursement from American Express without contacting Tucson Aero about the fraud. In March 2002, again after having reason to suspect Hering' s behavior, Cranmer told Tyconic that Hering would phone in a credit card for his account, and that she would come by to pay the shortfall caused by Hering's credit card fraud. Cranmer told Prudential Financial, and later Wells Fargo, that the Secret Service was investigating fraud against him, and he gave them a nonexistent Secret Service report number. Cranmer provided Prudential Bank with a cell phone number answered by someone who claimed she did not know Cranmer. Cranmer told Weaver about the alleged Secret Service investigation, incorrectly stated that Gary Coiwill was his attorney, and gave Weaver an incorrect phone number for Coiwill. Although Cranmer told FBI agent Scharman that Hering had told Cranmer about the FBI/Secret Service investigation, a few days later Cranmer told the Tucson Police Department that Scharman was working on a fraud case for him.

These facts would lead a prudent person to conclude that Cranmer was at least a willing participant in some of Hering's crimes. As Defendants point out, Cranmer himself was concerned that he could have been implicated in the crimes. (Cranmer Deposition at 93:8—9, Exh. 6, City Defs.' Stmnt.

Facts (Dec. 14, 2004).) Det. Lenard's sources were several reliable bank investigators. Cf Fuller v. MG. Jewelry, 950 F.2d 1437, 1444—45 (9th Cir. 1991) (finding that investigation behind arrest was sufficiently thorough where officers corroborated citizen informant testimony with several other witnesses). Even assuming that Hering had deceived Cranmer so thoroughly as to cause him to innocently make all of the above erroneous statements, the likelihood of such an explanation was not so great that it negated the reasonable belief that Cranmer had been involved in the crimes. In addition, "the mere fact a prosecution was unsuccessful does not mean it was not supported by probable cause." Freeman v. City of Santa Aria, 68 F.3d 1180, 1189 (9th Cir. 1995). Consequently, the City Defendants committed no Fourth Amendment violation in arresting Cranmer.

Plaintiff has not met his burden of opposing the motion for summary judgment with specific facts. Even if the Court were to consider Plaintiff's untimely response, Plaintiff offers no evidence of his own, does not cite Defendants' evidence, and does not even cite Defendants' Statement of Facts. Plaintiff merely quotes the City Defendants' motion for summary judgment, which in turn refers to their statement of facts. These facts, already considered above, describe Hering's misconduct, but they do not absolve Cranmer to such a degree that no probable cause existed to support his arrest. Similarly, in Plaintiffs response to the Tyconic Defendants, he cites only page 131 of his own deposition, which shows that he told Speilman that

he would come to Tyconic to pay the bill. This conversation between Cranmer and Spellman is not sufficiently clear or revealing to undermine Speilman's reasonable belief that Cranmer had committed crimes.

(2) Arizona Constitutional Claim

The City Defendants are entitled to summary judgment on Plaintiffs Victims' Bill ofRights claim. Article 2.1 (A)( 1) of the Arizona Constitution provides that victims "be treated with fairness, respect, and dignity, and be free from intimidation, harassment, or abuse. . . As discussed above, however, Cranmer's arrest was not wrongful, and no evidence indicates that the interrogation was abusive. In addition, victims' rights do not attach until the arrest of the perpetrator, and Hering was not arrested until later on the day of Cranmer's arrest. See A.R.S. § 13-4402(A). See also State v. Stauffer, 203 Ariz. 551, 554, 58 P.3d 33, 36 (App. 2002) (victims' rights "arise only upon an arrest 9 or formal charg[e]").

(3) Violation of Rights Under the Laws of Arizona

Plaintiff alleges the violation of his rights under the laws of Arizona. Defendant moves for this claim to be dismissed for failure to state a claim upon which relief can be granted, pursuant to Rule l2(b)(6), Fed. R. of Civ. P. Plaintiff did not respond to this argument. Under LRCiv 7.2(i), Local Rules, failure to respond to a motion may be deemed a consent to the granting of the motion, and the Court may dispose of

the motion summarily. Accordingly, Count III of Plaintiffs complaint is dismissed.

(4) False Imprisonment

Plaintiffs false imprisonment claim fails because his arrest was reasonable, "The law is well settled that the existence of probable cause is a complete defense to claims of false imprisonment and malicious prosecution." Flockett v. City of Tucson, 139 Ariz. 317, 319, 678 P.2d 502, 505 (App. 1983). The "imprisonment" of Cranmer was not "false," because probable cause existed for the arrest. Restatement (Second) of Torts § 121 (Arrest by Peace Officer Without Warrant).

(5) Malicious Prosecution

Plaintiffs malicious prosecution claim fails for the same reason that the false imprisonment claim fails above.

(6) Defamation of Character

Any statements made by the City Defendants in investigating and arresting Cranmer are entitled to privilege against his defamation claim. Long v. Mertz, 2 Ariz. App. 215, 220, 407 P.2d 404, 409(1965) (absolute privilege exists for statements made "while doing an act in the course of 9 official duties which [are] directed or authorized specifically [I law"; qualified privilege exists unless statements "were

actuated by malice in fact or were not made in good faith").

(7) Gross Negligence/Negligence

The City Defendants have shown that their actions were reasonable, and Plaintiff has not raised a genuine issue of material fact indicating that their actions were negligent, nor that they were grossly negligent. Weatherfordex re/i MichaelL. v. State, 206 Ariz. 529, 536 n.4, 81 P.3d 320, 327 n.4 (2003) ("[N]egligence suggests 'a failure to measure up to the conduct of a reasonable person.' [Daniels v. Williams, 474 U.S. 327, 332 (1986).] Gross negligence generally signifies 'more than ordinary inadvertence or inattention. .. .' [Fargo v. City of San Juan Bautista, 857 F.2d 638, 641 (9th Cir. I 988)j.") See also Fuller, 950 F.2d at 1444—45 (investigation based on multiple corroborated sources is sufficiently thorough).

(8) Intentional Infliction of Emotional Distress

Finally, the City Defendants have shown that they did not commit intentional infliction of emotional distress. An TIED claim fails if the Defendant's conduct was not "extreme and outrageous." See Citizen Publishing Co. v. Miller, 2005 WL 1538272, *3 (Ariz. Sup. Ct. July 1, 2005).

> That issue may only go to the jury where "reasonable minds may differ." [Restatement (Second) of Torts § 46]. Even if a defendant's conduct is

> unjustifiable, it does not necessarily rise to the level of "atrocious" and "beyond all possible bounds of decency" that would cause an average member of the community to believe it was "outrageous." Ford v. Revlon, Inc., 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987); [Lucchesi v. Frederic N. Stimmell, MD., Ltd., 149 Ariz. 76, 78, 716 P.2d 1013, 1015 (1986)]. Nelson v. Phoenix Resort Corp., 181 Ariz. 188, 199, 888 P.2d 1375, 1386 (App. 1994).

There is no evidence of extreme and outrageous conduct. The arrest, by itself, was reasonable and was supported by probable cause. Reasonable minds could not conclude that the interrogation was extreme and outrageous. The questioning period was intermittent, and lasted only three hours, including the breaks. No physical force or restraints were used. Cranmer was permitted to use the restroom. Speliman did not even raise his voice. That Speilman repeatedly prompted Cranmer to confess is mild. Speilman's accusations that Cranmer had committed fraud, possibly even in his claiming to be a physician, was not "beyond all possible bounds of decency" given Spellman's reasonable belief that Cranmer had assisted in numerous frauds. See Schiller v. Mitchell, 828 N.E.2d 323, 334 (In. App. 2005) ("There is nothing inherently extreme and outrageous about conducting investigations or inspecting or questioning or suspecting."); Tavakoli-Nouri v. State, 779 A.2d 992, 1000 (Md. App. 2001) (public arrest and dragging to detention room, interrogation, body search,and handcuffing was not "extreme and outrageous").

Tyconic

Plaintiffs claims against the Tyconic Defendants derive wholly from the actions of Speilman. Plaintiffs claims do not mention any specific wrongdoing by Kathleen Dailey, except to the extent that she was Speliman's supervisor and could have prevented Speliman's torts. Plaintiffs claims against Tyconic, Inc. and Dailey are brought under a theory of vicarious liability, because they consented to the arrest occurring at Tyconic.

As discussed above, Spellman is entitled to summary judgment on the torts alleged against him. The other Tyconic Defendants have shown that Spellman was acting within the scope of his authority as a police officer, and not as a Tyconic flight instructor.

> [A]n employee is acting within the scope of his employment while he is doing any reasonable thing which his employment expressly or impliedly authorizes him to do or which may reasonably be said to have been contemplated by that employment as necessarily or probably incidental to the employment.

Ray Korte Chevrolet v. Simmons, 117 Ariz. 202, 207, 571 P.2d 699, 704 (App. 1977). Arresting Cranmer was not authorized by or incidental to Speilman's duties as a flight instructor. Although Plaintiff's complaint alleges that Tyconic plotted to lure Cranmer to the business, the evidence shows that

Cranmer initiated the contact with Tyconic on the day of his arrest, and that Cranmer volunteered to come to pay an unpaid bill. Tyconic's and Dailey's only activity was to permit Spellman to detain and arrest Cranmer at Tyconic. A person who "aid[s] a peace officer shall not be held liable to any person for damages resulting therefrom, provided such person acted reasonably . . . ." A.R.S. § 13-2403. A business's mere grant of permission for a police officer to detain a suspect on the premises until backup arrives is reasonable, This is not to suggest that the blending of Spellmants off-duty job at Tyconic with his law enforcement responsibilities was ideal.

Conclusion

The City Defendants are entitled to summary judgment because they have shown that probable cause supported Cranmer's arrest, and that they treated Cranmer reasonably.

Tyconic Defendants are entitled to summary judgment because they are not liable for merely permitting the police to arrest Cranmer on the premises.

Accordingly,
IT IS ORDERED that Defendants' motion to strike [DOC # 46] is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's responses [DOC ## 40 and 42] to Defendants' motions for summary judgment are STRICKEN as untimely. The Clerk of the Court is directed to lodge both of

Plaintiff's responses so that they will be included in the record in the event of an appeal.

IT IS FURTHER ORDERED that all Defendants' motions for summary judgment[DOC #1131 and 32] are GRANTED.

IT IS FUIRTHIER ORDERED that the Clerk of the Court is directed to enterjudgment accordingly.

DATED this 12th day of September, 2005.

S/_____
John M. Roll
United States District
Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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| Lee Cranmer, a sir gle person,<br><br>Plaintiff,<br><br>vs.<br><br>Tucson Police Department; City of Tucson; Chief Richard Miranda; Detective M. Lenard and John Doe Lenard, wife and husband; Officer Mark Spellman and Jane Doe Spellman, husband and wife,<br><br>Defendants. | ) | No. 03-CV-282 TUC JMR<br><br>ORDER |
| Lee Cranmer, a single person,<br><br>Plaintiff,<br><br>vs.<br><br>Tyconic, Inc.; Mark Spellman and Jane Doe Speilman, husband and wife; Kathleen Dailey and John Doe Dailey, wife and husband,<br><br>Defendants. | ) | Consolidated No. 04-CV-150 TUC JMR |

Pending before this Court is Plaintiffs Motion for New Trial under 59(a), Motion to Correct or Amend Judgment under Rule 59(e), Motion for Relief from Judgment under Rule 60(b), and Plaintiffs Alternative Motion for Reconsideration. Also pending is Plaintiffs Motion for Leave to Amend or Supplement Motion For New Trial.

Background

These cases involve the fraudulent activities of Jeanie Hering, the apparent wife of PlaintiffLee Cranmer, M.D. Tucson Police investigators believed that Plaintiff was Hering's accomplice in the ongoing fraud, and they eventually arrested both on the same day. Hering was convicted, but Plaintiff was never formally charged, and he brought these consolidated lawsuits against the police and Tyconic, the business that assisted the police in Plaintiffs apprehension.

Plaintiff filed his complaints against both sets of Defendants in state court on April18, 2003. Defendants removed the cases to this Court, which the Court consolidated on May 26, 2004. Plaintiff alleged that his warrantless arrest by the City Defendants violated the Fourth Amendment of the U.S. Constitution, Article 2. 1(A)(1) of the Arizona Constitution, and "laws of the State of Arizona." Plaintiff also alleged that in arresting him, the City committed false imprisonment, malicious prosecution, defamation of character, gross negligence, and negligence, and that Spellman's interrogation constituted intentional infliction of emotional distress. Plaintiff alleged that

the Tyconic Defendants, in participating in Spellman's activities, committed false imprisonment, defamation of character, and intentional infliction of emotional distress.

Both sets of Defendants, the City and Tyconic, filed a motion for summary judgment on December 14, 2004. The Court extended, on Plaintiffs motion, the time for Plaintiffs response to February 11, 2005. Plaintiff did not respond, and, on February 18, 2005, Defendants filed a joint request for summary disposition of the motions. The Court did not act on this request. Plaintiff filed his Opposition to Summary Judgment in June 2005 which the Court struck for lateness. Plaintiff filed a motion to reconsider, and on June 15, 2005, this Court vacated its previous order striking Plaintiffs Opposition and directing Plaintiff to submit a memorandum explaining why they should not be stricken. Plaintiff submitted this memorandum on July 1, 2005.

Throughout most of this time Plaintiff was represented by attorney David L. Bjorgaard. Mr. Bjorgaard explained in the July 1,2005 memorandum that he failed to file Plaintiffs Oppositions earlier due to personal circumstances. On June 22, 2005, Plaintiff consulted new counsel, who associated with Mr. Bjorgaard. New counsel learned around this time that an expert in fraud investigation, Gerry Goddard, had been consulted by Mr. Bjorgaard earlier in the case, but had not prepared a report or affidavit. Counsel contacted Mr. Goddard and provided him with needed documents to render an opinion.

On September 12, 2005, this Court granted Defendants' motions for summary judgment. The order was entered and served on counsel on September 27, 2005. On October 7, 2005, Plaintiff filed the current pending motions. At about the time this Court's order granting the motions for summaryjudgment was entered, Mr. Goddard provided his affidavit, and report to Plaintiffs counsel. These documents state, specifically and in detail, that Det. Lenard lacked probable cause to arrest Plaintiff.

Legal Analysis

Plaintiff has filed a Motion for New Trial under 5 9(a), a Motion to Correct or Amend Judgment under Rule 59(e), and a Motion for Relief from Judgment under Rule 60(b).1 Under Fed.R.Civ.P. 59(a), the District Court has the discretion to reopen a judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions. Amendment or alteration of a judgment is also appropriate under Rule 59(e) if (1) the District Court is presented with newly discovered evidence; (2) the District Court committed clear error or made an initial decision that was manifestly unjust; or (3) there is an intervening change in controlling law. Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001). Finally, Rule 60(b) provides for discretionary relief from a final judgment for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; or (3) any reason justifying relief from the operation of the judgment.

Plaintiff s alleged three grounds for relief of judgment are (1) newly discovered evidence; (2) attorney mistake; and (3) manifest injustice.

(1) Newly Discovered Evidence

Plaintiff is attempting to put into evidence the affidavit and report of Gerry Goddard, Plaintiffs alleged expert witness. Plaintiff claims that the report and affidavit are newly discovered evidence' because they did not exist until the date they were created, September 20, 2005.

Plaintiff also filed a motion for reconsideration, in the event that the Court considered the other three motions untimely. However, the Court finds the other three motions timely. Therefore, the Court will not consider Plaintiffs motion for reconsideration.

The analysis under Rule 59 and 60 in regard to new evidence is largely identical. See Jones v. Aero/Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990). The movant must establish that (1) the evidence was discovered after trial; (2) the exercise of due diligence would not have resulted in the evidence being discovered at an earlier stage; and (3) the newly discovered evidence is of such magnitude that production of it earlier would lilcely have changed the outcome of the case. Defenders of Wildlife v. Bernal, 204 F.3d 920, 929 (9th Cir. 2000); Feature Realty, Inc., v. City of Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003).

"Evidence is not newly discovered under the Federal Rules if it was in the moving party's possession at the time of [the motion for summary judgment] or could have been discovered with reasonable diligence." Coastal Transfer Co. v. Toyota Motor Sales, 833 F.2d 208, 212 (9th Cir. 1987). The evidence must have been previously unavailable. Defenders of IVild4fe, 204 F.3d at 929. "The overwhelming weight of authority is that the failure to file documents in an original motion or opposition does not turn the late filed documents into newly discovered evidence." School District No. IJ, Multnomah County, Oregon, 5 F.3d 1255, 1263 (1993).

The affidavit and report of Mr. Goddard is not "newly discovered." Plaintiffs former and current counsel were aware that Mr. Goddard existed, that he was creating this affidavit and report, and presumably had some idea as to what the report would contain. Yet, Mr. Goddard was never disclosed by former counsel, and Plaintiffs new counsel did nothing to inform the other side of Mr. Goddard's existence or impending report and affidavit. The report and affidavit cannot be considered unavailable simply because Plaintiff's counsel failed to timely disclose Mr. Goddard and obtain this information from him. See Trentacosta v. Frontier Pac. Aircraft Indus., Inc., 813 F.2d 1553, 1557 & n.4 (9th Cir. 1987) (finding that court did not abuse its discretion in refusing to consider affidavits opposing summary judgment filed late); FrederickS. Wyle Professional Corp. v. Texaco, Inc., 764 F.2d 604, 609 (9th Cir.

1985) (finding that evidence available to party before it filled its opposition was not newly discovered evidence" warranting reconsideration of summary judgment); Waltman v. International Paper Co., 875 F.2d 468, 473-74 (SthCir. 1989) (finding materials available at time of filing opposition to summary judgment would not be considered with motion for reconsideration).

Further, there is no indication that earlier production of this evidence would have changed the outcome of the case. Much of Mr. Goddard's report is argumentative, speculative, and immaterial to the issues at hand.

(2) Attorney Mistake

Plaintiff claims that an amended or altered judgment is necessary because of attorney conduct. Specifically, Plaintiff claims that because of error on the part of Mr. Bjorgaard,
Plaintiff did not get Mr. Goddard's report and affidavit in time to file it before summary judgment was entered.

Rule 60(b)(1) provides for discretionary relief from a fmal judgment for mistake, in advertence, surprise, or excusable neglect. Relief from judgment may be granted for mistakes by any person and can include an attorney's negligent failure to meet a deadline. Robb v. Norfolk & Western Ry. Co., 122 F.3d 354 (7th Cir. 1997). Otherwise, careful clients

can be penalized for omissions of their careless attorneys. However, as a general rule, parties are bound by the actions of their lawyers, and alleged attorney malpractice does not usually provide a basis to set aside a judgment pursuant to Rule 60(b)(1). Casey v. Albertson's Inc. 362 F.3d 1254, 1260 (9th Cir. 2004); Pioneer mv. Servs. Co. v. Brunswick Assocs. Ltd F- ship, 507 U.S. 380, 397 (1993) (finding that parties are required to be held accountable for the acts and omissions of their chosen counsel). Neither ignorance nor carelessness on the part of the litigant or his attorney provide ground for relief under Rule 60(b)(1). Allmerica Fin. Ljfe Ins. & Annuity Co. v. Llewellyn, 139 F.3d 664, 666 (9th Cir. 1997). Also, it does not matter that Plaintiff himself might not have been aware that his attorney was not pursuing his ease in a diligent manner. See Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082 (finding that knowledge learned by Plaintiffs former counsel was properly attributable to Plaintiff itself).

Whether Plaintiff is entitled to relief under F.R.C.P. 60(b) is an equitable decision and several factors are considered. These factors include, but are not limited to, "(1) the danger of prejudice to the opposing party; (2) the length of the delay, (3) the reason for the delay and its potential impact on the proceedings; and (4) whether the movant acted in good faith." Laurino, MD. v. Syringa General Hospital, 279 F.3d 750, 753 (9th Cir. 2002).

Plaintiff claims the other parties in this case would not be prejudiced by granting a new trial because the only effect of such relief would be that

the motions would be considered on a full record and proceed to trial. However, Defendants would be prejudiced because they timely completed their discovery before given notice of the existence of Mr. Goddard and were, therefore, not given a chance to take him into account while preparing discovery for this case. Plaintiffs former counsel has already created numerous and lengthy delays in this matter. Defendants would have to incur additional defense costs, as well as a further delay in these proceedings. Further, even if the Court took into consideration Mr. Goddard's report, it would not have precluded summary judgment in this case.

Mr Goddard was not disclosed until 13 months past the deadline for expert disclosure, and Plaintiffs counsel gives no reason for this delay except to say that former counsel was remiss. Plaintiffs current counsel became aware of Mr. Goddard in June 2005 and did nothing to inform the other side or the court of Mr. Goddard's existence or of his expected report and affidavit until after judgment was rendered in October 2005. There was no telephone call or correspondence to the Defendants advising of the existence and pending disclosure of an expert report from Gerry Goddard, nor was any motion filed with the court seeking an extension of the disclosure deadline or to supplement or amend the record. Plaintiffs counsel fails to provide any explanation for this omission. Plaintiffs former and current counsel's conduct in these proceedings provide some indication of bad faith.

(3) Manifest Injustice

Plaintiff also appears to argue that the judgment should be amended because the Court decision creates a manifest injustice. Under 59(e), amendment or alteration of judgment is appropriate if the District Court made an initial decision that was manifestly unjust. Zimmerman, 255 F.3d at 740. Rule 60(b)(6) allows a court to vacate a judgment for any "reason justif~ring relief from the operation of the judgment." That rule "has been used sparingly as an equitable remedy to prevent manifest injustice." UnitedStates v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir.1993). To receive Rule 60(b)(6) relief a moving party must "show both injury and that circumstances beyond its control prevented timely action to protect its interests." Id; Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir. 1998). Neglect or lack of diligence is not to be remedied through Rule 60(b)(6). United States v. RG & B Contractors, Inc., 21 F.3d 952, 956 (9th Cir.1994).

After a review of the relevant evidence and law, Plaintiff has not presented this Court with anything that would persuade the Court to reconsider its previous ruling under Rule 59(e) or Rule 60(b)(6).

Motion to Amend or Supplement

On May 9, 2006, Plaintiff filed a motion for leave to amend or supplement the above motions. Plaintiff seeks to provide additional evidence of Mr. Bjorgaard's "abandonment" of other clients and to show that Mr. Bjorgaard may have been under a disability that made it impossible for him to represent Plaintiff in this case. Plaintiff alleges that

this disability amounts to "extraordinary circumstances" that form the basis for relief from judgment under F.R.C.P. 60(b). Plaintiff has not shown cause for the Court to grant this motion. Even if the Court allowed amendment of Plaintiffs motions, Plaintiff alleges no specific way in which Mr. Bjorgaard's alleged disability has affected Plaintiffs case. The only error that Mr. Bjorgaard has allegedly committed, from the pleadings, is failure to disclose Mr. Goddard in a timely manner. However, current counsel became aware of Mr. Goddard's presence in June 2005, yet failed to disclose Mr. Goddard's existence until October 2005, and still fails to provide any explanation for this delay. Further, as discussed previously, Mr. Goddard's report would not have precluded summary judgment in this matter.

Accordingly,

IT IS ORDERED that Plaintiffs Motion for New Trial under 59(a), Motion to Correct or Amend Judgment under Rule 59(e), Motion for Relief from Judgment under Rule60(b), and Plaintiffs Alternative Motion for Reconsideration [Doc. # 54] are DENIED.

IT IS FURTHER ORDERED that Plaintiffs Motion for Leave to Amend or Supplement Motion for New Trial [Doc. # 80] is DENIED.

DATED this 7th day of July, 2006.

S/
John M. Roll
Chief United States Dist. Judge

NOT FOR PUBLICATION

FILED
MAY 14 2008
MOLLY C.
DWYER,
CLERK
U.S. COURT
OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEE CRANMER, a single person,
Plaintiff- Appellant,

No. 06-16383
D.C. No.
CV-03-00282-J
MR

v.

MEMORANDUM

TYCONIC INC.; KATHLEEN DAILEY, wife; MARK SPELLMAN, husband; JANE DOE SPELLMAN, wife; JOHN DOE DAILEY, husband; CITY OF TUCSON POLICE DEPARTMENT; TUCSON, CITY OF; RICHARD MIRANDA, Chief; M LENARD, Detective, wife; JOHN DOE LENARD, husband

Defendants - Appellees.

C-2

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted March 10, 2008
Phoenix, Arizona

Before: HAWKINS, THOMAS, and CLIFTON, Circuit Judges.

This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Plaintiff-Appellant Lee Cranmer appeals the district court's grant of summary judgment in favor of Tyconic, Inc., the City of Tucson Police Department, the City of Tucson, and individual defendants (collectively, "the defendants"). We affirm.

I

The determinative question on the merits of the summary judgment appeal is whether probable cause existed for the arrest. In Arizona, a police officer has probable cause for an arrest if, under "the totality of the facts and circumstances known to police officers at the time of the arrest," an officer has "reasonable grounds to believe that an offense is

being or has been committed by the person arrested." State v. Lawson, 698 P.2d 1266, 1272 (Ariz. 1985) (internal citation omitted). The arresting officer is not required to be personally aware of all the facts establishing probable cause "as long as 'probable cause exists from the collective knowledge of all the law enforcement agents involved in th[e] operation." Lawson, 698 P.2d at 1272 (quoting State v. Sardo, 543 P.2d 1138, 1143 (Ariz. 1975)).

The district court properly concluded that probable cause to arrest Cranmer existed as a matter of law. Sergeant Spillman, the arresting officer, had discussed the grounds for Cranmer's arrest with Detective Lenard, the fraud investigator assigned to Cranmer's case. During the course of her investigation, Detective Lenard learned numerous facts from credible sources that would have given a reasonable officer grounds to believe Cranmer had been a willing participant in Jeanie Hering's fraudulent schemes. For example, Detective Lenard learned that Cranmer had received large items of furniture, flying lessons, and large bank deposits as a result of Hering's fraud. Lenard also learned that Cranmer had provided several pieces of misinformation to fraud investigators, including a non- existent Secret Service report number and the name of an attorney who stated he did not know Cranmer and was not in private practice. Therefore, although later development of the facts showed that Hering had misled Cranmer, the facts as known to the officers at the time of the arrest were sufficient to establish probable cause.

H

The district court did not abuse its discretion in denying Cranmer's Rule 60(b) motion. Cranmer provides four possible grounds for such relief: (1) newly discovered evidence, (2) excusable neglect, (3) gross negligence, and (4) manifest injustice.

In order for a moving party to merit relief based on newly discovered evidence, the moving party must show the evidence (1) is in fact "newly discovered," (2) "could not have been discovered through due diligence, and (3) was 'of such magnitude that production of it earlier would have been likely to change the disposition of the case." Jones v. Aero/Cliem Corp., 921 F.2d 875, 878 (9th Cir. 1990) (quoting Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., Inc.,833 F.2d 208,211(9th Cir. 1987)).

None of the evidence Cranmer proffers is in fact "newly discovered." First, while his expert witness Jerry Goddard's affidavit and report did not actually exist until eight days after the district court signed the order granting summary judgment, the evidence on which they were based had been in the possession of Cranmer's former counsel. Thus, the affidavit and report cannot be considered "newly discovered." See Coastal Transfer, 833 F.2d at 212 (holding that expert's testimony was not "newly discovered" when evidence on which the testimony was based had been in movant's possession since start of litigation). Second, Cranmer's deposition testimony and Lenard's grand jury testimony both existed long before the district court's order granting

summary judgment. Neither can constitute "newly discovered evidence."

Federal Rule of Civil Procedure 60(b)(1) provides that a court may relieve a party from a final judgment for "mistake, inadvertence, surprise, or excusable neglect." Here, Cranmer argues that his former counsel's failure to file timely oppositions to the defendants' motions for summary judgment should be considered "excusable neglect." The term"excusable neglect" "encompass[es] situations in which the failure to comply with a filing deadline is attributable to negligence." Pioneer mv. Servs. Co. v. BrunswickAssocs. Ltd. P'ship, 507 U.S. 380, 394 (1993). In order to determine when such negligence is excusable, this Court conducts an equitable analysis that depends on at least four factors. These include: "(1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith."Laurino v. Syringa Gen. Hosp., 279 F.3d 750, 753 (9th Cir. 2002).

The district court did not err in concluding Cranmer had not demonstrated "excusable neglect." The district court correctly concluded that Cranmer's counsel had already caused "numerous and lengthy delays," and that the defendants would be prejudiced by the additional time and money a further delay in the proceedings would cause. Based on a balancing of these equities, it was not an abuse of discretion for the district court to deny Cranmer relief pursuant to Rule 60(b)(l).

Cranmer also argues he is entitled to relief, pursuant to Rule 60(b)(6), due to his former counsel's gross negligence in accordance with this Court's decision in Community Dental Services v. Tani, 282 F.3d 1164, 1169 (9th Cir. 2002). In Tani, however, this Court expressly relied on the fact that the district court had entered a default judgment in that case. Id. at 1169. The court reasoned that "judgment by default is an extreme measure and a case should, 'whenever possible, be decided on the merits." Id. at 1170 (quoting Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam)). Here, however, the district court entered judgment on the merits of the case. Thus Cranmer is not entitled to relief due to attorney abandonment or gross negligence under Rule 60(b)(6).

Finally, Cranmer argues he is entitled to relief because the district court's ruling was "manifestly unjust," under Rules 59 and 60. Under Federal Rule of Civil Procedure 59(e), a district court may, in its discretion, alter or amend a judgment if "the district court committed clear error or made an initial decision that was manifestly unjust." Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001). Additionally, Rule 60(b)(6) has been viewed by this Court as a "catch- all provision that allows a court to vacate a judgment for 'any other reason justifying relief from the operation of the judgment," and "has been used sparingly as an equitable remedy to prevent manifest injustice." Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir. 1998) (quoting United States v. AipineLand & Reservoir Co., 984

F.2d 1047, 1049 (9th Cir. 1993)). To receive relief under Rule 60(b)(6), a moving party must "show both injury and that circumstances beyond its control prevented timely action to protect its interests." Alpine Land, 282 F.3d at 1049.

In Zimmerman, the plaintiffs' argued it would be "manifestly unjust" for the district court to issue its ruling without first obtaining and considering particular evidence. This Court held that it was not an abuse of the district court's discretion to deny the plaintiffs' motion under Rule 59(e) because the evidence, even if considered, would still have failed to change the district court's conclusion in the case. 255 F.3d at 740-4 1. Similarly, the district court did not abuse its discretion here when it denied Cranmer's motions for relief based on manifest injustice because his evidence does not change the fact that the Tucson Police Department had probable cause to arrest Cranmer at the time of his arrest. Cranmer is thus unable to show he was "injured" under the law, as required by Rule 60(b)(6).

AFFIRMED

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MOLLY C. DWYER,
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U.S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEE CRANMER, a single person,
Plaintiff- Appellant,

V.

TYCONIC INC.; KATHLEEN DAILEY, wife; MARK SPELLMAN, husband JANE DOE SPELLMAN, wife; JOHN DOE DAILEY, husband; CITY OF TUCSON POLICE DEPARTMENT; TUCSON, CITY OF; RICHARD MIRANDA Chief~ M LENARD, Detective, wife; JOHN DOE LENARD, husband

Defendants - Appellees.

No. 06-16383
D.C. No.
CV-03-00282-J
MR
District of Arizona,
Tucson

ORDER

Before: HAWKINS, THOMAS, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc.Fed. R. App. p. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Federal Rules of Civil Procedure, Rule 60 (b):

Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

. . . . .

(6) any other reason that justifies relief.

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No. 08-532

Supreme Court, U.S.
FILED
NOV 2 1 2008
OFFICE OF THE CLERK

# In The Supreme Court of the United States

LEE CRANMER,

*Petitioner,*

vs.

TUCSON POLICE DEPARTMENT, CITY OF TUCSON, TYCONIC, INC., CHIEF RICHARD MIRANDA, DET. M. LENARD and JOHN DOE LENARD, OFC. MARK SPELLMAN and JANE DOE SPELLMAN, KATHLEEN DAILY and JOHN DOE DAILY,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

The determinative question on the merits of the summary judgment appeal was whether there was probable cause for Appellant Cranmer's arrest. The court of appeals upheld the lower court's determination that, as a matter of law, the Tucson Police Department had probable cause to arrest Cranmer. Cranmer's attorney's alleged "abandonment" of Cranmer did not affect the fact of probable cause. Did the court of appeals abuse its discretion when it denied Cranmer relief pursuant to Federal Rule of Civil Procedure 60(b)(6) for alleged attorney abandonment when its finding of probable cause was dispositive and thus Cranmer could not show injury?

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## DECISIONS BELOW

Cranmer requests this Court review the May 14, 2008 Memorandum Decision of the Ninth Circuit Court of Appeals which affirmed the District Court's Order denying Cranmer's Rule 60(b)(6), Fed. R. Civ. P. Motion for Relief from Judgment. The decision is unpublished.

The Memorandum Decision is not republished here, as it is included in Cranmer's Appendix to his Petition for Writ of Certiorari.

## BASIS OF JURISDICTION

The Ninth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES AND RULES INVOLVED

This Petition for Writ of Certiorari involves Rule 60(b)(6), Fed. R. Civ. P., which is set out in full in Appendix E to Cranmer's Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

In April 2003 Cranmer filed separate complaints against the City of Tucson and Tyconic, Inc. in

Arizona Superior Court, both arising from his arrest in April 2002 by the Tucson Police Department for theft and fraudulent schemes and artifices. Against the City he alleged a violation of the Fourth Amendment of the United States Constitution and state law claims of malicious prosecution, false arrest, intentional infliction of emotional distress, negligence, and defamation. The two cases were removed to federal court and consolidated.

Cranmer was arrested after an investigation in which police officers learned facts from credible sources that led them to believe that Cranmer had willingly participated in fraudulent schemes with his then-wife, Jeanie Hering. For example, prior to Cranmer's arrest the police learned that large items of stolen furniture were delivered to the home that Cranmer and Hering shared; that Cranmer's flight lessons were paid for by stolen credit cards; that large, fraudulently received sums were deposited into Cranmer's bank account; that Cranmer provided misinformation to investigators about Secret Service or FBI reports and investigations; that Cranmer provided misinformation about the name of his attorney who turned out to have no knowledge of Cranmer; that Cranmer repeatedly failed to return calls from a bank fraud investigator; and that Cranmer provided incorrect information to his bank that resulted in reimbursement to his account.

Evidence was later discovered indicating that Cranmer had been misled by Hering. Cranmer was never formally charged with a crime.[1] Hering, arrested the same day as Cranmer, was indicted by a grand jury and was ultimately convicted.

The district court's scheduling order required the parties to disclose expert witnesses and reports by August 20, 2004. After the City stipulated to an extension, Cranmer filed his Notice of Expert Disclosure on August 27, 2004. He listed Jerry Goddard as a police procedures expert, but failed to provide Goddard's report or qualifications as required by Fed. R. Civ. P. 26(2)(B) and by the court's order.

Both Cranmer and bank investigator Steve Weaver were deposed in the fall of 2004. Cranmer's attorney, David Bjorgaard, attended both depositions. City and Tyconic filed motions for summary judgment on December 14, 2004. Cranmer filed a motion to extend time to file his oppositions, which was granted. The basis of the motion was that Mr. Bjorgaard was out of town for the holidays and he and his son had both been sick. Cranmer was given until February 11, 2005, to file his oppositions. No response was filed by February 11 and no motion for leave to file oppositions past the deadline was filed. On

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[1] Cranmer states that there was a judicial finding that he was wrongfully arrested and charged. No evidence of this statement was ever presented to the district court or to the Ninth Circuit Court of Appeals and no such evidence is presented in Cranmer's Petition for Writ of Certiorari.

February 18, 2005, City and Tyconic filed a joint request for summary disposition of their motions. The Court did not respond to this request. Cranmer did not file his opposition to the City's Motion for Summary Judgment until June 2, 2005.

Cranmer's opposition did not dispute any fact set forth in the City's motion. The Court struck the opposition for being "inexcusably late." Cranmer filed a motion to reconsider. The Court vacated its order and ordered Cranmer to show cause why his oppositions should not be stricken for failure to comply with the rules and with the Court's orders. Mr. Bjorgaard filed a memorandum on July 1, 2005, explaining that his failure to file timely oppositions was due to his personal circumstances and was not the fault of Cranmer.

On June 22, 2005, attorneys David Lipartito and Jeffrey Rogers filed notice of association with Mr. Bjorgaard as co-counsel for Cranmer. Cranmer's new counsel learned that Jerry Goddard had been consulted by Mr. Bjorgaard earlier in the case, but had not prepared a report. A review of Mr. Goddard's affidavit revealed that at the time he was retained by Mr. Bjorgaard, he was provided with the same documents that were reviewed by, and formed the basis of the timely-filed report provided by the City's police procedures expert. New counsel contacted Mr. Goddard to request he prepare a report.

On September 27, 2005, the Court granted City's Motion for Summary Judgment. The Court again

ordered Cranmer's responses stricken as untimely. The Court's Order noted, however, that it had read Cranmer's responses and that even if they had been taken into consideration, it would not have changed the outcome.

On October 7, 2005, Cranmer filed his "Motion for New Trial Under Rule 59(a)/Motion to Correct or Amend Judgment Under Rule 59(e)/Motion for Relief From Judgment Under Rule 60(b), or Alternative Motion for Reconsideration," with attached exhibits. One of the exhibits was the affidavit and report of Jerry Goddard that had been provided to Cranmer's new counsel on September 20, 2005. The City had not been advised of the pending disclosure of a report from Goddard, nor had Cranmer filed a motion with the Court seeking a disclosure deadline extension, Fed. R. Civ. P. Rule 56(f) relief, or leave to file a supplement to the record. Goddard's report opined that Cranmer was arrested without probable cause. The other exhibits, which Cranmer claimed would preclude the granting of summary judgment, included an excerpt from Cranmer's October 2004 deposition and an excerpt from Jeanie Hering's May 2002 grand jury hearing.

Cranmer claimed that his deposition excerpts showed that he had actively attempted to investigate the fraud himself, and that he is a person of impeccable character. As for the grand jury excerpt, Cranmer's only stated reason for wanting the court to consider it was for a statement made by Detective Lenard which Cranmer mischaracterized. In the

Motion for a New Trial, Cranmer stated that Det. Lenard testified before the grand jury that "she did not know whether Cranmer was aware of or involved in [Hering's] activities, just that he might have been." However, a review of the transcript reveals that Det. Lenard actually testified that Cranmer "might or might not" have had any awareness of Hering's fraudulent payments to the two flight schools. This statement hardly indicates lack of probable cause for Cranmer's arrest for a multitude of fraudulent activities, nor even for the fraud perpetrated against the flight schools. Furthermore, probable cause does not require absolute certainty, only a fair probability. *United States v. Smith,* 790 F.2d 789, 792 (9th Cir. 1986); *Brescher v. Von Stein*, 904 F.2d 572, 578 n.9 (11th Cir. 1990).

City filed an opposition. Seven months later, on May 9, 2006, Cranmer filed a Motion for Leave to Amend or Supplement Motion for New Trial. He attached docket sheets, motions, and orders from other cases that he asserted showed attorney Bjorgaard had "abandoned" other clients as a result of a disability (depression). City filed an opposition noting that none of Cranmer's exhibits evidenced that a "disability" was the cause of Bjorgaard's failure to comply with discovery in those cases, and in any event, there was probable cause for Cranmer's arrest.

On July 7, 2006, the Court denied Cranmer's "Motion for New Trial Under Rule 59(a)/Motion to Correct or Amend Judgment Under Rule 59(e)/Motion for Relief From Judgment Under Rule 60(b), or Alternative Motion for Reconsideration," as well as

his Motion to Amend the Motion for New Trial. Cranmer then filed his Notice of Appeal to the Ninth Circuit Court of Appeals.

The Court of Appeals affirmed the district court's decision, finding that the determinative question on the merits of the summary judgment appeal was whether there was probable cause for Cranmer's arrest. The Court determined that the district court had properly concluded that probable cause to arrest Cranmer existed as a matter of law. Because the district court had entered judgment on the merits of the case, Cranmer was not entitled to relief.

The Petition for Writ of Certiorari appeals just the denial of the Rule 60(b)(6) Motion for Relief from Judgment. It does not raise any issue with regard to the denial of the Rule 59(a) Motion for a New Trial or the Rule 59(e) Motion to Correct or Amend Judgment.

## REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

### A. Probable cause for the arrest is the determinative issue. At the time of his arrest, the Tucson Police Department had probable cause to arrest Cranmer. Attorney David Bjorgaard's alleged "abandonment" of Cranmer is irrelevant to that issue as is Jerry Goddard's opinion that the police did not have probable cause for the arrest.

Probable cause is a matter of law and is not properly the subject of expert testimony. *United*

*States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999); *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2nd Cir. 1991) ("as a general rule, an expert's testimony on issues of law is inadmissible"); *Marx v. Gumbinner*, 905 F.2d 1503, 1507 (11th Cir. 1990) (opinion evidence about legal conclusions does not create an issue of fact sufficient to defeat summary judgment). Because "it is the responsibility of the trial judge to say whether the facts give rise to probable cause, the expressions of opinions by others are not relevant and are wholly immaterial to the decision in the case." *Carroll v. Kalar*, 112 Ariz. 595, 599, 545 P.2d 411, 415 (1976).

Bjorgaard's handling of the case is not determinative. Cranmer contends that had Bjorgaard placed Goddard's report before the court in a timely manner, the result would have been different, but the lower courts did consider that evidence and determined that it did not change the fact of probable cause. Probable cause is a complete defense to all of the claims brought by Cranmer against the City.

### B. The Ninth Circuit Court of Appeals did not abuse its discretion when it upheld the denial of Cranmer's Motion for Relief from Judgment Under Rule 60(b).

As "newly discovered evidence" Cranmer pointed to excerpts from Cranmer's deposition, an excerpt from the grand jury proceedings in the Hering case, and the affidavit and report of Jerry Goddard. When moving

to have alleged newly discovered evidence considered, the movant must establish that (1) the evidence was discovered after trial; (2) the exercise of due diligence would not have resulted in the evidence being discovered at an earlier stage; and (3) the newly discovered evidence is of such magnitude that production of it earlier would likely have changed the outcome of the case. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 929 (9th Cir. 2000); *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093 (9th Cir. 2003).

"Evidence is not 'newly discovered' under the Federal Rules if it was in the moving party's possession at the time of [the motion for summary judgment] or could have been discovered with reasonable diligence." *Coastal Transfer Co. v. Toyota Motor Sales*, 833 F.2d 208, 212 (9th Cir. 1987). Cranmer's deposition was taken on October 26, 2004. The portions of it that he wished to bring to the court's attention were not "newly discovered" for purposes of the rule just because new counsel did not see it until late September 2005. The Grand Jury in the Hering case convened on May 3, 2002. The transcript cannot be considered "newly discovered" over three years later. Goddard's report was not "newly discovered." Mr. Bjorgaard retained him by at least August 2004 and gave him 700 pages of discovery to examine, including Detective Lenard's investigative file. This was long before the current attorneys for Cranmer became associated with the case in June 2005. A report from Goddard was not obtained by new counsel until September 20, 2005. In any event, Cranmer did not

ask for Rule 56(f) relief. The timing of the disclosure of Goddard's report was always under Cranmer's control.

The district court noted that even if Goddard's report had been timely produced and used in the opposition to the motion for summary judgment, it would *not* have changed the outcome. The court stated: "Much of Mr. Goddard's report is argumentative, speculative, and immaterial to the issues at hand." The court stated that even if it had taken the report into consideration, "it would not have precluded summary judgment in this case." Furthermore, only facts admissible in evidence can be relied upon by a court when ruling on a motion for summary judgment. An expert witness cannot proffer legal conclusions, including whether there was probable cause for an arrest. *United States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999); *Marx v. Gumbinner*, 905 F.2d 1503, 1507 (11th Cir. 1990) (opinion evidence about legal conclusions does not create an issue of fact sufficient to defeat summary judgment). Goddard's opinion as to whether there was probable cause for the arrest is irrelevant.

### C. To qualify for Rule 60(b)(6) relief, the moving party must show both injury and circumstances beyond its control. There was probable cause for Cranmer's arrest; he cannot show injury.

Rule 60(b)(6) allows a court to vacate a judgment for any "reasons justifying relief from the operation of

the judgment." The rule "has been used sparingly as an equitable remedy to prevent manifest injustice." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). Neglect or lack of diligence is not to be remedied through Rule 60(b)(6). *United States v. RG & B Contractors, Inc.*, 21 F.3d 952, 956 (9th Cir. 1994). A moving party must "show both injury and that circumstances beyond its control prevented timely action to protect its interests." *Lehman v. United States*, 154 F.3d 1010, 1017 (9th Cir. 1998). Here, Cranmer's arrest was based on probable cause. He cannot, therefore, show any injury as a result of the alleged attorney abandonment.

### D. There is no conflict between the decision by the Ninth Circuit Court of Appeals in this case and its decision in *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164 (9th Cir. 2002).

Cranmer argues that he is entitled to Rule 60(b)(6) relief due to his former counsel's gross negligence/abandonment. In his Ninth Circuit Court appeal brief he cited *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1169 (9th Cir. 2002) as authority. Cranmer now claims that the ruling by the Ninth Circuit Court of Appeals in the case at bar is in conflict with the *Tani* case. There is no conflict. In *Tani*, the Court expressly relied on the fact that the district court had entered a default judgment in the case. *Id.* at 1169. The court noted that "judgment by default is an extreme measure and a case should, 'whenever possible, be decided on the merits.'" *Id.* at 1170 (quoting

*Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam)).

The result in *Tani* was not dependent on the dismissal having been on a motion for a default judgment versus a motion for summary judgment. Rule 60(b)(6) can apply to any final judgment. In the case at bar, there was a ruling on the merits: the court determined that, as a matter of law, the Tucson Police Department had probable cause to arrest Cranmer. Cranmer is not entitled to relief due to gross negligence or attorney abandonment under Rule 60(b)(6).

## CONCLUSION

There was probable cause for Appellant Cranmer's arrest by the Tucson Police Department. Probable cause was the determinative question on the merits of the summary judgment appeal. Cranmer's former attorney's alleged "abandonment" of Cranmer has no effect on the fact of probable cause. Thus the Court of Appeals did not abuse its discretion when it denied Cranmer relief pursuant to Federal Rule of Civil Procedure 60(b)(6).

Respectfully submitted,

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